

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

PETITION NO. E005 OF 2024

(Before Hon. Justice Dr. Jacob Gakeri)

**IN THE MATTER OF ARTICLES 1(1), 2(1)(2)(5) & (6),
3(1), 10, 19, 20, 22(1), 35, 41, 47, 73, 75, 165(3)
(B), 235, 236, 258, 259(1) OF THE CONSTITUTION
OF KENYA, 2010**

**IN THE MATTER OF ARTILCES 22(1) & 165(3)(b) of
the 2010 CONSTITUTION ON THREATENED AND
ACTUAL VIOLATIONS OF THE BILL OF RIGHTS
AND**

**IN THE MATTER OF SECTIONS 3(1), 31 AND 40 OF
THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012
AS READ WITH SECTION 4 OF THE FAIR
ADMINISTRATIVE ACTION ACT, 2016**

**IN THE MATTER OF THE CONTRAVENTION OF
ARTILCES 10, 20, 73, 75 & 236 OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF THE CONTRAVENTION OF
ARTICLES 28, 35, 41 & 47 OF THE BILL OF RIGHTRS
IN THE CONSTITUTION**

BETWEEN

DR. ALFRED NDEMO

ONG'ERA.....PETITIONER

VERSUS

**COUNTY GOVERNMENT OF KISII.....1ST
RESPONDENT**

**GOVERNOR KISII COUNTY.....2ND
RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD.....3RD
RESPONDENT**

RULING

Before the court for determination is the applicant's Notice of Motion dated 27th June, 2025 filed under certificate of urgency seeking Orders that:

1. Spent.
2. Spent.
3. *This Honourable Court be pleased to find and hold that the Respondent herein through its Governor, the 2nd respondent Mr. Paul Simba Arati have disobeyed defied and/or ignored the Court Order/Decree issued herein on 8th May, 2024 and subsequently committed to civil jail for a period not exceeding 6 months*

pending compliance with the Honourable Court's Orders.

4. The Honourable Court be pleased to deny the Respondent's audience in this matter until and unless they purge the contempt of court.

5. The respondents be Ordered to pay costs of this Application.

The Notice of Motion is expressed under Section 12 of the Employment and Labour Relations Court Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, and is based on the grounds set out on its face and the Supporting Affidavit of the Applicant sworn on 27th June, 2025.

The applicant's case is simply that on 8th May, 2024 the court decreed Orders in his favour which the respondents had refused to honour service of the Decree notwithstanding.

The applicant states that counsel's letters dated 6th June, 2024 and 19th February, 2025 remained unresponded to by the respondents.

By a Supplementary Affidavit sworn on 12th August, 2025 the applicant deponed that service of documents upon

the respondents was effected through one Mr. Elija Gekonge Nyangau and the applicant wrote two letters after the judgment.

The applicant maintained that the respondents ignored court Orders and denied receipt of letters allegedly sent by the respondents on the matter and in particular the letter dated 29th May, 2024 and letter on reassignment of duties and no evidence of receipt of the letters had been availed.

In relation to service of court Orders, the affiant deposed that the respondents were represented in court and personal service was effected by the process server.

The affiant denied having resigned from his duties but deposed that the purported resignation was in response to the respondents conduct of ignoring his letters and frustration.

Respondent's case

In their grounds of opposition dated 14th July, 2025, the respondents contended that the instant application was fatally flawed, incompetent and fundamentally defective

for want of personal service upon the respondents as by law required and absence of penal notice.

It is the respondent's case that the application violated Article 50 of the Constitution of Kenya on the right to fair hearing and Article 47 on fair administrative action.

The respondents further faulted the applicant for failing to disclose that he voluntarily resigned as a County Executive Committee Member, and thus had unclean hand.

That the application was vague as it did not identify the specific individuals in contempt or what the persons did not do for culpability to arise, the court Orders sought to be enforced were ambiguous, incapable of enforcement and were draconian.

That the applicant failed to establish the elements of contempt.

In their Replying Affidavit sworn by Earnest Osoro on 28th July, 2025, the affiant deposed that the final relief granted by the court and the findings of the court were inconsistent and created uncertainty. That the decree

was ambiguous and internally contradictory and a party ought not be punished for contempt for such orders.

According to the respondents, the 2nd respondent reassigned the applicant from Department of Public Service, County Administration and Public Participation to the Department of Youth & Sports Culture and Social Services vide letter dated 29th May, 2024 and the applicant resigned from office on 4th November, 2024 vide letter of even date and appeared on Getembe TV, a Kisii language station and publicly announced his resignation which was accepted on 5th November, 2025, facts the applicant did not disclose, a material non-disclosure sufficient to have the instant application struck out.

The affiant deposes that the respondents implemented the court Orders but the applicant had since vacated office, there was nothing to enforce and the application was an academic exercise as it had been overtaken by events.

Finally, the affiant deposed that the applicant had not demonstrated personal advice.

Applicant's submissions

As regards compliance with the court orders dated 8th May, 2024, counsel submitted that the Governor was duly served as demonstrated by the process server as service was effected through his agents.

Counsel further submitted that the respondents could not allege that they were unaware of the Orders, could not implement them, nor alleged that they were vague and unambiguous yet did not respond to the demand letters.

Concerning the Orders sought by the applicant reliance was placed on the decisions in **Republic V Mohammed & another [2019] KESC 47(KLR)**, **Shimmers Plaza V National Bank of Kenya [2015] eKLR**, **Faith Adhiambo Apuko V Hon. Julius Gaya & others, Kisumu Petition No. E002 of 2022**, **Sammy Nyamweya & others V Kenya Premier League & others [2015] eKLR**, **Jeremiah Achola Odindo V County Government of Kisumu JR E024 of 2024** , **Econet Wireless Ltd V Minister for Information & Communication of Kenya & another [2005] eKLR** **Basic Criticus V Attorney General & others [2012] eKLR**, among other, to urge that court Orders must be obeyed by all persons to whom they are directed and those in contempt ought to face appropriate sanctions.

Counsel urge that personal knowledge of the court orders superseded the duty to be serviced.

Finally, on the standard of proof counsel cited the decisions in **Ochino & another V Okombo & others [1989] KECA 65 (KLR)**.

Respondents submissions

As to whether the judgment relied upon was ambiguous, contradictory and incapable of enforcement through contempt, counsel for the respondent submitted that it was on account of internal contradictions.

That whereas under paragraph 49 of the Judgment the court found that there was no constructive dismissal and the applicant remained in office, the order of reinstatement which presupposes that there had been a removal could not co-exist and thus unambiguous, and as such no person ought to be cited for contempt on that basis.

As regards compliance with the Judgment, counsel submitted that the respondents implemented the orders of the court as evidenced by the respondents letter dated

29th May, 2024 on reassignment of the applicant but he refused to report to the office thus frustrating the judgment and on 4th November, 2024, he voluntarily resigned, announced it publicly on Gatembe TV and it was accepted by the Governor vide letter dated 5th November, 2025.

Concerning non-disclosure for having failed to disclose his resignation, reassignment of duty and acceptance of his resignation which ran to the root of the application, counsel urged that the application should fail on that score.

Relatedly, counsel submitted that the instant application was an abuse of the court process.

On legal and procedural defects, counsel contended that the absence of personal service under relevant rules and the Constitution of Kenya rendered the application fatally defective.

Counsel submitted that under Rule 81.5 of the English Civil Procedure Rules which applies by dint of Section 5 of the Judicature Act, personal service was the 1st requirement for a contempt of court application to succeed and the burden of proof of service is borne by the applicant and none had been availed in this case.

Reliance was placed on the sentiments of the Court of Appeal in **Nyamodi Ochieng Nyamogo & another V Kenya Posts & Telecommunication Corporation [1994] eKLR** on the essence of personal service.

As regards Penal Notice, Counsel submitted that in law the basis of contempt proceedings was a penal notice endorsement to underscore the grave penal consequence of non-compliance, without which contempt proceedings could not stand.

Reliance was placed on the sentiments of the Court in **Mwangi H. C. Wangonde V Nairobi City Commission Civil Appeal No. 95 of 1998** as well as those in **Nyamodi Ochieng Nyamogo & another V Kenya Posts & Telecommunication Corporation (supra)**, on the essence of penal notice to the alleged contemnor to urge the court to adopt the same.

The more recent decision in **Republic V Mwaura & 12 others [2024] KEHC 44 (KLR)** was also cited to reinforce the submission.

Finally, counsel submitted that contempt liability could only attach on natural persons and not incorporated associations such as the County Government or the County Public Service Board.

Relatedly, that knowledge of the Orders and deliberate defiance by an identifiable officer was essential.

Analysis and determination

It is common ground that by a judgment dated 8th May, 2025 Stephen Radido J directed that:

- (i) A declaration is hereby issued that the 2nd respondent's decision to send the Petitioner on compulsory leave was unlawful.*
- (ii) An Order of certiorari is hereby issued quashing the decision of the 2nd respondent to send the Petitioner on compulsory leave.*
- (iii) A mandatory Order is hereby issued compelling the 1st and 2nd respondents to reinstate the Petitioner to the position of County Executive Committee Member (CECM).*
- (iv) The Petitioner has succeeded. He is awarded costs against the respondents.*

A decree in the foregoing terms was issued on 19th July, 2024.

Whereas the claimant maintained that the respondents were guilty of contempt for disobeying court orders, the respondents contended that the Orders were vague, unclear and incapable of implementation, there was neither personal service nor penal notice, the elements of contempt had not been established and contempt liability could only attaches on natural persons.

After careful consideration of the application, affidavits by both parties, submissions by counsel, authorities cited and the relevant law, the only issue for determination is whether the respondent's were in contempt of the court orders dated 8th May, 2025.

It is trite law that the principles that govern contempt of court Orders are well settled.

Section 5(1) of the Judicature Act gives this court jurisdiction in contempt matters.

It provides that:

The High Court and the Court of Appeal shall have the same power to punish contempt of court as is for the time being possessed by the High Court of Justice in England and such power shall extend to upholding the authority and dignity of subordinate courts.

See Justus Kariuki Mate V Martin Nyaga Wambora & another [2014] KECA 590 KLR and Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 others [2014] KECA 945 KLR.

The law on contempt of court is as was exquisitely captured by Mativo J (as he then was) in **Samuel M. N. Mweru & others V National Land commission & 2 others [2020] eKLR** as follows:

“Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual

interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest”

Concerning the elements of contempt, Mativo J. stated as follows:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

*Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -*

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in Civil contempt cases which is higher than in civil cases) that (d) the defendant's conduct was deliberate".

See also **Katsuvi Ltd V Kapurchand Depar Shah [2016] eKLR Mahinderjit Singh Bitta V Union of India & others** No. 109 of 2010 **Republic V Attorney General & another Ex Parte Mike Kamau Maina**.

I will now proceed to determine whether the applicant has demonstrated that the respondents are guilty of contempt of court for having disobeyed court orders.

On service of the court Order with a penal notice, although the applicant submitted that the Governor was served personally, the applicant's Supporting Affidavit sworn on 27th June, 2025 only mentions that service of court orders was served on the respondents on 10th May, 2024, but a copy of the Order signed and stamped by the Governor or any of the respondents was not attached.

Similarly, the court was unable to trace the Affidavit of Service on the CTS.

It is trite law that service of the Orders where contempt of court is envisaged must be personal. It cannot be through agents or 3rd parties.

The foregoing proposition is fortified by the decision in **Jacob Zedekiah Ochino & another V George Aura Okombo & 4 others [1989] KECA 65 (KLR)** where the Court of Appeal expressed itself as follows:

*The power to deal with contempt of court is provided for under section 5 of the Judicature Act (cap 8) and order 39 rule 2(3) of the Civil Procedure Rules. We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. As this court pointed out recently in the case of **Mwangi Magondu V Nairobi City Commission** (Civil Appeal No 95 of 1988)...”.*

The duty of the party seeking to enforce court orders by contempt is an integral part of the right to fair trial or fair hearing which is an element of the overarching principle of the right to be heard which is non derogable, (see in this regard, the Supreme Court decision in **Stephen Maina Githiga & 5 others V Kiru Tea Factory Co. Ltd [2023] KESC 41 (KLR)**. See also **Kidero & 4 others V Waititu & 4 others [2014] KESC 11 (KLR)**).

The foregoing notwithstanding, the applicant submitted that the respondents were indeed aware of the court Orders, not only because they were represented in court, but also in their ambivalence, they contend that they were not served, the orders were vague and concomitantly argued that they implemented the Orders of the court.

In their Replying Affidavit sworn on 28th July, 2025, the respondents attached a copy of letter dated 29th May, 2024 re-assigning the applicant from the Department of Public Service, County Administration and Public Participation and office of the Governor to the Department of Youth, Sports, Culture and Social Services.

Similarly, in his letter accepting the applicant's resignation vide letter dated 4th November, 2025, the 2nd respondent informed the applicant that he had been notified of the reassignment by the then Acting County Secretary, one Robert Ouma vide WhatsApp an allegation the applicant did not controvert.

Equally, the respondent's contention that the court orders were ambiguous and contradictory and thus incapable of being enforced, left no doubt in the court's mind that they had knowledge of the court Orders.

From the foregoing, the court is in agreement with the applicant's argument that the respondents were aware of the court orders and thus bound to implement them.

The foregoing finding is fortified by the decision in **Basil Critico V Attorney General [2012] eKLR** where the Court of Appeal held:

"The law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a court Order, the strict requirement that personal service must be proved is rendered unnecessary".

Similarly, in **Shimmers Plaza Ltd V National Bank of Kenya Ltd [2015] eKLR**, the Court of Appeal stated *inter alia*:

“On the issue of service, we hold the view that knowledge of an Order supersedes personal service and for good reason. The law cannot countenance a situation where a party who is fully aware of a court Order is allowed to go around violating it simply because he was not personally served...”

In the instant case, the court finds that the 2nd respondent was aware of the court orders as evidenced by the letter dated 29th May, 2024.

Be that as it may, the applicant has neither alleged nor furnished evidence to demonstrate that the court Orders had a penal notice in cases of default to pay.

The second element of contempt is that the court order must have been clear and unambiguous. See **Mwangi Magondu V Nairobi City Commission (supra)**.

In **Carcy V Laiken 2015 SCC 17** the court stated:

“The Order alleged to have been breached must state clearly and unequivocally what should and should not be

done. This ensures that a party will not be found in contempt where an Order is unclear. An Order may be found to be unclear if for example it is missing an essential detail about where, when or to whom it applies, if it incorporates overly broad language, or if external circumstances have obscured its meaning”.

In the instant case, on 8th May, 2024, the court Ordered that (i) the 2nd respondent’s decision to send the applicant on compulsory leave was unlawful (ii) *Certiorari* to quash the decision of the 2nd respondent on compulsory leave and (iii) reinstatement of the applicant to his position as County Executive Committee Member and costs of the suit.

The respondent’s argument that the foregoing Orders were ambiguous and contradictory, primarily because of the term reinstatement under Order number (iii), in the court’s view lacks good faith for the simple reason that the first two Orders effectively meant that the applicant was required to resume duty immediately as the court found the compulsory leave unlawful and quashed it.

No reinstatement was necessary since the applicant’s employment had not been terminated by the respondents. This Order was not implementable in the

circumstances because the applicant was merely resuming duty.

Strangely, the respondents did not raise the issue that the court Orders were ambiguous or contradictory until the matter came to court.

In the court's view, the court Orders were neither ambiguous or contradictory nor unimplementable save for reinstatement.

The respondents were bound to implement them.

The last requirement, on which in the court's view, the instant application turns, is whether the respondent's acted in breach of the terms of the order or failed to comply with court Orders.

From the evidence on record, it is discernible that as early as 29th May, 2024, the 2nd respondents reassigned the applicant to a new Department and uncontroverted evidence further reveals that the applicant was notified of the same by one Mr. Robert Ouma, the then acting County Secretary as per the 2nd respondent's letter dated 5th November, 2025.

Puzzlingly, the applicant neither averred nor submitted or alleged that he reported to the workplace at anytime after 8th May, 2024, when the judgment was delivered or after the motion of impeachment failed.

The court having found, the 2nd respondent's decision to send the applicant on compulsory leave unlawful and quashed it, the applicant was at liberty to resume duty and no other formalities were necessary.

For unexplained reasons, the applicant did not resume duty and as records reveal, even after the motion of impeachment failed on 28th May, 2024. His counsel on record sought communication from the 2nd respondent vide letter dated 15th May, 2024 and another dated 4th July, 2024, on the outcome of the motion of impeachment.

The respondents did not respond to any of the letters.

Intriguingly, the applicant appears to have been insisting on a formal communication from the 2nd respondent yet he had a judgment and decree in his favour entitling him to resume duty effective Thursday 9th May, 2024 or at any

rate immediately after the motion of impeachment failed on 28th May, 2024.

The fact that the respondents did not respond to any of the letter by the applicant or his advocate on record is not sufficient evidence of failure to comply with the court orders.

None of the Orders required the 2nd respondent to respond to a letter, courtesy notwithstanding.

It is trite that court decrees are not enforced by consensus of the parties. It is the duty of the party in whose favour judgment was given to ensure that the decree is enforced and seeking the other party's response is, in the court's view, not an effective strategy.

As adverted to elsewhere in this ruling, the Orders issued on 8th May, 2024 were legally sufficient and self-executing for the applicant to resume duty but he did not, insisting on a formal communication from the 2nd respondent as opposed to presenting himself at the office to resume duty as the court Orders required. Similarly, the applicant did not provide any justification as to why he did not visit workplace yet he was still an employee of the County Government of Kisii and remained in

employment until he voluntarily resigned vide letter dated 4th November, 2025.

On the resignation, it is essential to underscore the fact that the applicant herein is guilty of material non-disclosure of that fact, a fact he willfully concealed from the court until it was brought up by the respondents.

A perfunctory mention of the resignation in whatever context would have ameliorated the applicant's position.

In his Supplementary Affidavit sworn on 12th August, 2025, the applicant stated that the purported resignation was a response to the respondents refusal to respond to his letters to spite them.

Having failed to resume duty in accordance with the court Orders, the applicant could not allege that his resignation was actuated by hostile or unpalatable working conditions to constitute a constructive dismissal. The resignation was on his own volition and it was accepted in writing vide letter dated 5th November, 2024.

Significantly, the applicant failed to identify what any of the respondents did or did not do in breach of court Orders.

Documentary evidence on record reveals that after the impeachment motion against the applicant was defeated on 28th May, 2024, the 2nd respondent reassigned the applicant to the Department of Youth, Sports, Culture and Social Services effective 29th May, 2024.

Having failed to report to the office to resume duty or seek the audience of the 2nd respondent, the applicant's case that the respondents breached the Orders issued on 8th May, 2024 remained unsubstantiated.

It is trite law that he who alleges is required to discharge the burden of proof.

Section 107 of the Evidence Act provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Under Section 108:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 of the Evidence Act relates to proof of existence of particular facts.

In the instance case, it requires no gainsaying that the applicant bore the burden of proof to show that the respondents or any of them was guilty of violating the Orders issued on 8th May, 2024.

It is trite law that the standard of proof in contempt of court matters is higher than in ordinary civil suits but lower than in criminal cases, as exquisitely captured by the Court of Appeal in **Mutitika V Baharini Farm Ltd [1985] KLR 229** as follows:

“In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities almost but not exactly beyond reasonable

doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs to wit in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature”.

Equally, in **B. V Attorney General [2004] IKLR 43** Ojwang J (as he then was) stated:

“...The rationale for this standard is that if cited for contempt and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such the standard of proof is higher than the standard in civil cases. This power to commit a person to jail must be exercised only as last resort. It is of utmost importance therefore for the respondents to establish that the alleged contemnor’s conduct was deliberate in the sense that he or she willfully acted in a manner that flouted the court Order”.

Finally, in **Mukuha V Gashwe & 14 others [2023] KECA 1482 KLR** the Court of Appeal expressed itself as follows:

“It is trite that the refusal to obey should be both willful and malafides and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt. The applicant must show that the offence is committed

not by mere disregard of a court Order, but by the deliberate and intentional violation of the court's dignity, repute or authority...

It is imperative to note that claims for contempt require proof and provision of evidence, which shall establish the commission of the acts complained of to the intermediate standard, that the standard above the balance of probabilities but not beyond reasonable doubt”.

See also **Joseph Kinyua & 2 others V Robert Kimathi Mati [2020] KECA (KLR) 75.**

Applying the foregoing principles to the facts of this case, the court is satisfied that the applicant has failed to demonstrate that the 2nd respondent or any of the respondents willfully failed, refused and or neglected to comply with the Orders of court issued on 8th May, 2024. The instant application failed to attain the threshold prescribed by law for the Orders sought to issue.

The upshot of the foregoing is that the application dated 27th June, 2024 is devoid of merit and it is accordingly dismissed.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 21ST DAY OF OCTOBER 2025.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL